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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

Text of draft Articles 1, 2 (paras. a, b and c), 11 to 14 bis [20 bis], 15 to 16 bis and 17 to 20 with commentaries thereto provisionally adopted by the Commission at its forty-sixth session

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Text of Articles 11 to 14 bis etc. will be issued in addenda to this document.

Text of draft Articles 1, 2 (paras. a, b and c), 11 to 14 bis [20 bis], 15 to 16 bis and 17 to 20 with commentaries thereto provisionally adopted by the Commission at its forty-sixth session

General Commentary

(1) It is the Commission's view that the present science-based civilization is marked by the increasingly intensive use in many different forms of resources of the planet for economic, industrial or scientific purposes. Furthermore, the scarcity of natural resources, the need for the more efficient use of resources, the creation of substitute resources, and the ability to manipulate organisms and micro-organisms have led to innovative production methods, sometimes with unpredictable consequences. Because of economic and ecological interdependence, activities involving resource use occurring within the territory, jurisdiction or control of a State may have an injurious impact on other States or their nationals. This factual aspect of global interdependence has been demonstrated by events that have frequently resulted in injuries beyond the territorial jurisdiction or control of the State where the activity was conducted. The frequency with which activities permitted by international law, but having transboundary injurious consequences are undertaken, together with scientific advances and greater appreciation of the extent of their injuries and ecological implications dictate the need for some international regulation in this area.

(2) The Commission believes that the legal basis for establishing international regulation in respect of these activities has been articulated in State practice and judicial decisions, notably by the International Court of Justice in the Corfu Channel case in which the Court observed that there were "general and well-recognized principles" of international law concerning "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." 1/ The Trail Smelter Tribunal reached a similar conclusion when it stated that, "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory

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1/ Corfu Channel Case (Merits) (United Kingdom/Albania), ICJ Reports, p. 22, 1949.

of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." 2/ Lauterpacht also supported that view stating that "[a] State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighbouring State." 3/

(3) Principle 21 of the Stockholm Declaration on the Human Environment is also in support of the principle that States in the exercise of their sovereign right to exploit their own resources have the responsibility "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the national jurisdiction." 4/ Principle 21 was reaffirmed in General Assembly resolutions: 2995 (XXVII) adopted on 15 December 1972 on Cooperation between States in the Field of Environment, 5/ 3129 (XXVIII) adopted on 13 December 1973 on Cooperation in the Field of the Environment concerning Natural Resources Shared by Two or More States, 6/ 3281 (XXIX) of 12 December 1974 adopting the Charter of Economic Rights and Duties of States, 7/ and by Principle 2 of Rio Declaration on Environment and Development. 8/ In addition operative paragraph 1 of General Assembly resolution 2995 further clarified Principle 21 of the Stockholm Declaration where it stated that "in the exploration, exploitation and development of their natural resources, States must

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2/ Trail Smelter Case, United Nations, Reports of International Arbitral Awards, vol. 3, p. 1965, (1949).

3/ Oppenheim, International Law, (8th ed. by H. Lauterpacht, 1955), vol. 1, p. 291.

4/ Document A/CONF.48/Rev.1.

5/ General Assembly Official Records: Twenty-seventh Session, Supp. No. 30 ( ), p. 42.

6/ General Assembly Official Records: Twenty-eighth Session, Supp. No. 30, (A/9030), p. 48.

7/ General Assembly Official Records: Twenty-ninth Session, Supp. No. 30, (A/9631), p. 50, see in particular arts. 2, 30 and 32 (2).

8/ Document A/CONF.151/26/Rev.1 (vol. I), p. 3.

not produce significant harmful effects in zones situated outside their national jurisdiction". 9/ Support of this principle is also found in UNEP Principles of the Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared Between Two or More States 10/ and in a number of OECD Council Recommendations. 11/

(4) The Commission believes the judicial pronouncements and doctrine and pronouncements by international and regional organizations together with non-judicial forms of State practice provide sufficient basis for the following articles which are intended to set a standard of behaviour in relation to the conduct and the effect of undertaking activities which are not prohibited by international law but could have transboundary injurious consequences. The following articles elaborate, in more detail, the specific obligations of States in that respect. States will be assisted if they know what steps should be taken, as a matter of international law, so that one's territory is not used in a manner that is detrimental to persons and property in or the environment of other States.

(5) As indicated in the introduction to this chapter of the report, the Commission decided in 1992 to approach the topic in stages. The first stage deals with issues of preventing transboundary harm of activities with a risk of such harm. The following articles are designed to deal only with that particular issue. The commentaries to the articles are also narrowly focused to deal with that specific issue.

9/ See supra note 5.

10/ United Nations document UNEP/IG 12/2 (1978) reproduced in International Legal Materials, vol. 17, p. 1097.

11/ See 1974 OECD Council Recommendation c (74) 224 concerning Transfrontier Pollution (Annex title B), OECD, OECD and the Environment, 1986, p. 142; 1974 Recommendation c (74) 220 on the Control of Eutrophication of Waters, ibid., p. 44; and 1974 Recommendation c (74) 221 on Strategies for Specific Water Pollutants Control, ibid., p. 45.

[CHAPTER I. GENERAL PROVISIONS] *

Article 1

Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

Commentary

(1) Article 1 defines the scope of the articles designed specifically to deal with measures to be taken in order to prevent transboundary harm of activities with a risk of such harm.

(2) Article 1 limits the scope of the articles to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State, and which involve a risk of causing significant transboundary harm through their physical consequences. This definition of scope introduces four criteria.

(3) The first criterion refers back to the title of the topic, namely that the articles apply to "activities not prohibited by international law". 12/ This element, though already indicated in the title of the topic, is incorporated in the scope article because of its critical role in delimiting the parameters of the articles. This criterion is also crucial in making the distinction between the scope of this topic and that of the topic of State responsibility which deals with "wrongful acts".

(4) The second criterion is that the activities to which preventive measures are applicable are "carried out in the territory or otherwise under the jurisdiction or control of a State". Three concepts are used in this criterion: "territory",

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* The designation of the chapter is provisional.

12/ The Commission has not yet changed in the title of the topic the word "acts" by "activities". The Commission's choice of the word "activities" in the articles is on the basis of the recommendation of the Working Group set up by the Commission in 1992 that "the Commission decided to continue with its working hypothesis that the topic deal with 'activities'". See Official Records of the General Assembly, Forty-seventh Session, Supp. No. 10, (A/47/10), para. 348.

"jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments, 13/ the Commission finds it useful to mention also the concept of "territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

(5) For the purposes of these articles, "territory" refers to areas over which a State exercises its sovereign authority. The Commission draws from past State practice, whereby a State has been held responsible for activities, occurring within its territory, which have injurious extra-territorial effects. In the Island of Palmas, Max Huber, the sole arbitrator, stated that "sovereignty" consists not entirely of beneficial rights. A claim by a State to have exclusive jurisdiction over certain territory or events supplemented with a demand that all other States should recognize that exclusive jurisdiction has corollary. It signals to all other States that the sovereign State will take account of the reasonable interests of all other States regarding events within its jurisdiction by minimizing or preventing injuries to them and will accept responsibility if it fails to do so:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as the corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." 14/

(6) Judge Huber then emphasized the obligation which accompanies the sovereign right of a State:

13/ See, for example, Principle 21 of the Stockholm Declaration, Report of the Stockholm Conference, United Nations document A/CONF.48/14; the 1982 United Nations Convention on the Law of the Sea, United Nations document A/CONF.62/122, art. 194, para. 2; Principle 2 of the Rio Declaration, United Nations document A/CONF.151/26 (vol. I) p. 3; and Principle 3 of the United Nations Convention on Biological Diversity of 5 June 1992, document DPI/1307.

14/ United Nations, Reports of International Arbitral Awards, vol. 2, p. 838.

> "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other States; for it serves to provide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." 15/

(7) The Corfu Channel is another case in point. There, the International Court of Justice held Albania responsible, under international law, for the explosions which occurred in its waters and for the damage to property and human life which resulted from those explosions to British ships. The Court, in that case, relied on international law as opposed to any special agreement which might have held Albania liable. The Court said:

> "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of the minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on The Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communications, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." 16/

(8) Although the Court did not specify how "knowingly" should be interpreted where a State is expected to exercise its jurisdiction, it drew certain conclusions from the exclusive display of territorial control by the State. The Court stated that it would be impossible for the injured party to establish that the State had knowledge of the activity or the event which would cause injuries to other States, because of exclusive display of control by the territorial State. The Court said:

15/ Ibid., p. 839.

16/ ICJ Reports, 1949, p. 22.

> "On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has its bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of facts and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion." 17/

(9) In the Trail Smelter, the Tribunal referred to the corollary duty accompanying territorial sovereignty. In that case, although the Tribunal was applying the obligations created by a treaty between the United States and the Dominion of Canada and had reviewed many of the United States cases, it made a general statement which the Tribunal believed to be compatible with the principles of international law. The Tribunal held: "under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons herein, when the case is of serious consequence and the injury is established by clear and convincing evidence." 18/ The Tribunal quoted Professor Eagleton to the effect that "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction," and noted that international decisions, from the Alabama onward, are based on the same general principle. 19/

(10) In the Lake Lanoux award, the Tribunal alluded to the principle prohibiting the upper riparian from altering waters of a river if it would cause serious injury to other riparian States:

17/ Ibid., p. 18.

18/ UNRIAA, vol. 3, p. 1965.

19/ United Nations, International Arbitral Awards, vol. 3, p. 1963, C. Eagleton, Responsibility of States in International Law, 1928, p. 80.

> "Thus, while admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstance calculated to do serious injury to the lower riparian State, such a principle has no application to the present case, since it was agreed by the Tribunal ... that the French project did not alter the waters of the Carol." 20/

(11) Other forms of State practice have also supported the principle upheld in the judicial decisions mentioned above. For example, in 1892 in a border incident between France and Switzerland, the French Government decided to halt the military target practice exercise near the Swiss border until steps had been taken to avoid accidental transboundary injury. 21/ Also following an exchange of notes, in 1961, between the United States and Mexico concerning two United States companies, Payton Packing and Casuco located on the Mexican border, whose activities were prejudicial to Mexico, the two companies took substantial measures to ensure that their operations ceased to inconvenience the Mexican border cities. 22/ Those measures included phasing out certain activities, changing working hours and establishing systems of disinfection. 23/ In 1972, Canada invoked the Trail Smelter principle against the United States when an oil spill at Cherry Point, Washington resulted in a contamination of beaches in

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20/ Lake Lanoux Arbitration (France-Spain), United Nations, Reports of International Arbitral Awards, vol. 12, p. 281.

21/ P. Guggenheim, "La pratique suisse (1956)", Annuaire suisse de droit international, 1957 (Zurich), vol. XIV, p. 168.

22/ M. M. Whiteman, ed., Digest of International Law (Washington D.C.), vol. 6, pp. 258-259.

23/ Ibid.

British Columbia. 24/ There are a number of other examples of State practice along the same line. 25/

(12) Principle 21 of the Stockholm Declaration on the Human Environment 26/ and Principle 2 of the Rio Declaration on Environment and Development 27/ prescribe principles similar to Trail Smelter and Corfu Channel.

(13) Historically, the expression "territory", has been used together with the concept of "sovereignty" to limit physically the exercise of sovereign rights of States. If it was concluded that a particular territory belonged to a particular

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24/ See Canadian Yearbook of International Law, vol. 11, pp. 333-334, 1973. The Trail Smelter principle was applied also by the District Court of Rotterdam in the Netherlands in case against Mines Domaniales de Potasse d'Alsace. See J.G. Lammers, Pollution of International Watercourses, p. 198 (1984).

25/ In Dukovany, in former Czechoslovakia, two Soviet-designed 440 megawatt electrical power reactors were scheduled to be operating by 1980. The closeness of the location to the Austrian border led to a demand by the Austrian Ministry for Foreign Affairs for joint ranks with Czechoslovakia about the safety of the facility. This was accepted by the Czechoslovak Government. Osterreichische Zeitschrift fur Aussenpolitik, vol. 15, p. 1 cited in G. Handl, "Conduct of abnormally dangerous activities in frontier areas: The case of nuclear power plant siting", Ecology Law Quarterly, Berkeley Cal. vol. 7, 1978, p. 1. In 1973, the Belgian Government announced its intention to construct a refinery at Lanaye, near its frontier with the Netherlands. The Netherlands Government voiced its concern because the project threatened not only the nearby Netherlands national park but also other neighbouring countries. It stated that it was an established principle in Europe that, before the initiation of any activities that might cause injuries to neighbouring States, the acting State must negotiate with those States. The Netherlands Government appears to have been referring to an existing or expected regional standard of behaviour. Similar concern was expressed by the Belgian Parliament, which asked the Government how it intended to resolve the problem. The Government stated that the project had been postponed and that the matter was being negotiated with the Netherlands Government. The Belgian Government further assured Parliament that it respected the principles set out in the Benelux accords, to the effect that the parties should inform each other of those of their activities that might have harmful consequences for the other member States. Belgium Parliament, Questions et réponses bulletin, 19 July 1973.

26/ See Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Doc.A/CONF.48/Rev. 1.

27/ See Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Doc. A/CONF.151/26 (Vol. I).

State, it was assumed that, under international law, that territory was subject to the sovereign rights of that State and not to any other. The more contemporary usage of sovereignty or sovereign rights expresses a more complex legal relationship. Sovereignty may be exercised in relation to certain types of resources in a territory and not to the whole territory. 28/ In other words,

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28/ A prime example of this case is article 56 of the United Nations Convention on the Law of the Sea. Under this article, a coastal State has "sovereign right" in its exclusive economic zone for the purposes of exploration and exploitation, and conserving and managing the natural resources, but has "jurisdiction" with regards to the establishment of artificial islands, marine scientific research, etc. Article 56 reads:

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

States may have title to certain resources in a territory and not the whole of the territory. This usage of sovereignty has broken down the unity between sovereignty and territory. It is therefore with this caveat, that the Commission defines the term "territory".

(14) The use of the term "territory" in article 1 also stems from concerns about a possible uncertainty in contemporary international law as to the extent to which a State may exercise extraterritorial jurisdiction in respect of certain activities. It is the view of the Commission that, for the purposes of these articles, territorial jurisdiction is the dominant criterion. Consequently when an activity occurs within the territory of a State, that State must comply with the preventive measures obligations. "Territory" is, therefore, taken as conclusive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered by these articles, the territorially-based jurisdiction prevails. The words "or otherwise" after the word "territory" intend to signify the special relation of the concept "territory" to the concepts "jurisdiction or control". The Commission, however, is mindful of situations, where a State, under international law, has to yield jurisdiction within its territory to another State. The prime example of such a situation is innocent passage of a foreign ship through territorial sea or territorial waters. In such situations, if the activity leading to a significant transboundary harm emanates from the foreign ship, the flag State and not the territorial State must comply with the provisions of the present articles.

(15) The Commission is aware that the concept of "territory" for the purposes of these articles is somewhat narrow. There are situations where, under international law, a State exercises jurisdiction and control over places over which it has no territorial right, i.e., the rights of a belligerent occupant over occupied territories. Hence there are situations where a State is in de facto in control of a territory. To cover activities taking place under these circumstances, the concepts of "jurisdiction" and "control" are also used.

(16) The expression "jurisdiction" of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its

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See, A/CONF.62/122.

competence and authority. The Commission is aware that questions involving the determination of jurisdiction are complex and sometimes constitute the core of a dispute. This article certainly does not presume to resolve all the questions of conflicts of jurisdiction. In this article, the concept of jurisdiction is defined only to make it possible to reasonably determine the scope of this topic.

(17) There are several situations in which jurisdiction is not territorially based. Under international law, a State may exercise jurisdiction in a territory over which it has no sovereign right. This could arise in several types of relationships between States: 29/ (a) international dependency relationships, especially "suzerainty" and international protectorate; (b) relationships between a federal State and member States of the federation which have retained their own international personality; (c) relationships between an occupying State and an occupied State in cases of territorial occupation.

(18) A State may exercise jurisdiction over a non-self-governing territory or over a trust territory. The State entrusted with the duty of caretaker of a non-self-governing territory or a trust territory has no territorial sovereignty over those territories, but it has been given, under international law, an extensive jurisdictional competence over such territories. The scope of such jurisdiction is determined by international law. It is the view of the Commission, that whenever a situation of "international" dependency is established between two States, but the "dependent" State still maintains its international personality, and the activities are taken place in the territory of the dependant State, the "dominant" State which has jurisdiction over the sphere of activities covered by these articles, is under an obligation to comply with these articles.

(19) In this regard, the Commission is instructed by the award in the Brown case, 30/ rendered on 23 November 1923 by the Arbitral Tribunal constituted by Great Britain and the United States of America under the Special Agreement of 18 August 1910. In that case, the question was raised as to the extent Great Britain, which was at the time exercising "suzerainty" in relation to foreign affairs of

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29/ See paras. 10 to 25 of Commentary to art. 28 of Part One on State Responsibility, Yearbook ... 1979, vol. II (Part Two), pp. 96-106.

30/ United Nations, Reports of International Arbitral Awards, vol. 6, p. 120.

the South African Republic, should bear responsibility for the denial of justice suffered by an American citizen, Brown, in that country. The Tribunal agreed that there was a denial of justice to Brown, but held that Great Britain could not incur responsibility as the "suzerain" Power at the time when the denial of justice occurred. In the view of the Tribunal, although Great Britain had at that time a peculiar status and responsibility vis-à-vis the South African Republic, its "suzerainty" involved only rather loose control over the Republic's relations with foreign Powers and had not entailed any right of interference in nor control over internal activities legislative, executive or judicial. Accordingly, the conditions under which Great Britain could have been held responsible for an act such as a denial of justice, committed against a foreign national in the framework of such internal activities, were not fulfilled.

(20) The dependency relationship may also occur in the case of a federation in which the member States of the federation retain, from the standpoint of international law, a personality separate from that of the federal State. In the view of the Commission, the States members of a federal State are under an obligation to comply with the provisions of these articles. However, if the federal State exercises jurisdiction in respect of the activities covered by these articles, then it is the federal State that should comply with the obligations.

(21) International law may also recognize a State that is a belligerent occupant as having jurisdiction for certain matters over the territory of another State. Whether or not the occupation is complete or partial, it is the Commission's view that the occupying State is under an obligation to comply with the provisions of these articles, in so far as the occupying State has extended its jurisdiction over the conduct of activities covered by these articles.

(22) Sometimes due to the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over the ship. The Geneva Conventions on the Law of the Sea and the United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(23) Activities may also be undertaken in places where more than one State is authorized, under international law, to exercise particular jurisdictions that are not incompatible. The most common areas where there are functional mixed jurisdictions are the navigation and passage through the territorial sea, contiguous zone and exclusive economic zones. In such circumstance, the State which is authorized to exercise jurisdiction over the activity covered by this topic must, of course, comply with the provisions of these articles.

(24) In cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, jointly comply with the provisions of these articles.

(25) The Commission takes note of the function of the concept of "control" in international law, which is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction de jure, such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law. The Commission relies, in this respect, on the advisory opinion by the International Court of Justice in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). 31/ In that case, the Court after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the de facto control of South Africa over Namibia. The Court held:

> "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." 32/

31/ ICJ Reports, 1971, p. 14.

32/ Ibid., para. 118.

(26) The concept of control may also be used in cases of intervention to attribute certain obligations to a State which exercises control as opposed to jurisdiction. Intervention here refers to a short-time effective control by a State over events or activities which are under jurisdiction of another State. It is the view of the Commission that in such cases, if the jurisdictional State demonstrates that it had been effectively ousted from the exercise of its jurisdiction over the activities covered by these articles, the controlling State would be held responsible to comply with the obligations imposed by these articles.

(27) The third criterion is that activities covered in these articles must involve a "risk of causing significant transboundary harm". The element of risk is intended to limit the scope of the topic, at this stage of the work, to activities with risk and, consequently exclude from the scope activities which, in fact, cause transboundary harm in their normal operation, such as, for example creeping pollution. The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken or those activities which harm the so-called global commons per se but without any harm to any other State. The phrase "risk of causing significant transboundary harm" should be taken as a single term.

(28) The third criterion is intended to follow the well-established principle of sic utere tuo ut alienum non laedas (use your own property so as not to injure the property of another) in international law. The Commission agrees with Lauterpacht when he stated that this maxim is applicable to relation of States not less than those of individuals; it is one of those general principles of law applicable under Article 38 (1) (c) of the Statute of the International Court of Justice. 33/ Accordingly, the third criterion recognizes the freedom of States in utilizing their resources within their own territories but in a way not to cause significant harm to other States.

(29) The fourth criterion is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. It was agreed by the Commission that in order to bring this topic within a manageable scope, it

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33/ Oppenheim, International Law (8th ed. by H. Lauterpacht, 1955), vol. 1, pp. 346-347.

should exclude transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields. The Commission feels that the most effective way of limiting the scope of these articles is by requiring that these activities should have transboundary physical consequences which, in turn, result in significant harm.

(30) The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type - a consequence which does or may arise out of the very nature of the activity or situation in question, in response to a natural law. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality, not from an intervening policy decision. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

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Commentary

(1) Paragraph (a) defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous harm

and a high probability of causing other significant harm. The Commission feels that instead of defining separately the concept of "risk" and then "harm", it is more appropriate to define the expression "risk of causing significant transboundary harm" because of the interrelationship between "risk" and "harm" and the relationship between them and the adjective "significant".

(2) For the purposes of these articles, "risk of causing significant transboundary harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" which sets the threshold. In this respect the Commission drew inspiration from the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, 34/ adopted by the Economic Commission for Europe at its forty-fifth session in 1990. Under article 1, paragraph (f) of the Code of Conduct, "'risk' means the combined effect of the probability of occurrence of an undesirable event and its magnitude;". It is the view of the Commission that a definition based on the combined effect of "risk" and "harm" is more appropriate for these articles, and that combined effect should reach a level that is deemed significant. The prevailing view in the Commission is that the obligations of prevention imposed on States should be not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity, for the activities under discussion are not prohibited by international law. The purpose is to strike a balance between the interests of the States concerned.

(3) The definition in the preceding paragraph allows for a spectrum of relationships between "risk" and "harm", all of which would reach the level of "significant". The definition identifies two poles within which the activities under these articles will fall. One pole is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultrahazardous activities. The other pole is where there is a high probability of causing other significant harm. This includes activities which have a high probability of causing harm which while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word "encompasses" in the second line is intended to

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34/ Doc. E/ECE/1225 - ECE/ENVWA/16.

highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.

(4) As regards the meaning of the word "significant", the Commission is aware that it is not without ambiguity and that a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that "significant" is something more than "detectable" but less than "serious" or "substantial". The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.

(5) The Commission is mindful that the ecological unity of the Planet does not correspond to political boundaries. The Commission is aware that there are ongoing mutual impacts on States due to their lawful activities within their own territories. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable. Considering that the obligations imposed on States by these articles deal with activities that are not prohibited by international law, the Commission feels that the threshold of intolerance of harm cannot be placed below "significant".

(6) The threshold of "significant" seems to have considerable support in international law for the requirement of taking preventive measures or imposing liability. The Trail Smelter Tribunal imposed liability only in cases "of serious consequences". 35/ The Lake Lanoux Tribunal noted that the principle prohibiting the upstream State to alter the flow of water applied only where the downstream State has been (gravement) "seriously" injured. 36/ A number of conventions have also used "significant", "serious" or "substantial" as the

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35/ United Nations, Reports of International Arbitral Awards, vol. 3, p. 1,965.

36/ Ibid., vol. 12, p. 308.

threshold. 37/ "Significant" has also been used in other legal instruments and domestic laws. 38/

(7) The Commission is also of the view that the term "significant", while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation, at a particular time might not be considered "significant" because at that specific time, scientific knowledge or human appreciation for a particular resource had not reached a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered "significant".

37/ See, for example, Art. 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities adopted on 2 June 1988, International Legal Materials, vol. 28, p. 868; Art. 2 (1) and (2) of Convention on Environmental Impact Assessment in a Transboundary Context adopted on 25 February 1991 (E/ECE/1250), reprinted in International Legal Materials, vol. 30, p. 800; Art. I (b) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters adopted in 1990 (E/ECE/1225).

38/ See, for example, operative paras. 1 and 2 of General Assembly Resolution 2995 (XXVII) Concerning cooperation between States in the field of the Environment, General Assembly Official Records: Twenty-seventh Session, Supp. No. 30, p. 42 (1973); Recommendation of the Council of the Organization for Economic Co-operation and Development on Principles Concerning Transfrontier Pollution, 1974, para. 6, OECD, Non-Discrimination in Relations to Transfrontier Pollution: Leading OECD Documents, p. 35, (1978), reproduced also in International Legal Materials, vol. 14, p. 246, (1975); The Helsinki Rules on the Uses of the Waters of International Rivers, art. 10, International Law Association, Report of the 52nd Conference (Helsinki, 1966), p. 496 (1967); and art. 5 of the draft Convention on industrial and agricultural use of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965, OAS, Rios y Lagos Internacionales, p. 132 (4th ed. 1971).

See also the 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, 32 U.S.T., p. 2,541, T.I.A.S. No. 9856; and the 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, Art. 7, in International Legal Materials, vol. 22, p. 1,025 (1983).

United States has also used the word "significant" in its domestic law dealing with environmental issues. See the American Law Institute, Restatement of the Law, Section 601, Reporter's Note 3, pp. 111-112.

(8) Paragraph (b) defines "Transboundary harm" as meaning harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border. This definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. It includes, for example, injurious impacts on ships or platforms of other States on the high seas as well. It will also include activities conducted in the territory of a State with injurious consequences on, for example, the ships or platforms of another State on the high seas. The Commission cannot forecast all the possible future forms of "transboundary harm". It, however, makes clear that the intention is to be able to draw a line and clearly distinguish a State to which an activity covered by these articles is attributable from a State which has suffered the injurious impact. Those separating boundaries are the territorial boundaries, jurisdictional boundaries and control boundaries. Therefore, the term "transboundary" in "transboundary harm" should be understood in the context of the expression "within its territory or otherwise under its jurisdiction or control" used in article 1.

(9) Paragraph c defines "State of origin" as the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out. The definition is self-explanatory. In cases where there is more than one "State of origin", they shall individually and jointly, as appropriate, comply with the provisions of these articles.

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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

Rapporteur: Mr. Peter Kabatsi

TEXT OF DRAFT ARTICLES 1, 2 (PARAGRAPHS A, B AND C), 11 TO 14 BIS [20 BIS], 15 TO 16 BIS AND 17 TO 20 WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SIXTH SESSION ...

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[CHAPTER II

PREVENTION]*

Article 11

Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.

Commentary

(1) This article imposes an obligation on States to ensure that activities having a risk of causing significant transboundary harm are not undertaken in their territory or otherwise under their jurisdiction or control without their prior authorization. The word "authorization" means granting permission by governmental authorities to conduct an activity covered by these articles. States are free to choose the form of such authorization.

(2) The Commission also recalls the decision of the International Court of Justice in the Corfu Channel case, where the Court held that a State has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States." 39/ In the view of the Commission, the requirement of prior authorization creates the presumption that activities covered by these articles are taking place in the territory or otherwise under the jurisdiction or control of a State with the knowledge of that State.

(3) The words "in their territory or otherwise under their jurisdiction or control", are taken from article 1 for consistency. The words "activities referred to in article 1" is a shorthand for "activities involving a risk of causing significant transboundary harm".

(4) The second sentence of article 11 contemplates situations where a major change is proposed in the conduct of an activity that is otherwise innocuous, where the change would transform that activity into one which involves a risk of

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* The designation of the chapter is provisional.

39/ I.C.J. Reports, 1949, p. 22.

causing significant transboundary harm. The implementation of such a change would also require State authorization. It is obvious that prior authorization is also required for a major change planned in an activity already within the scope of article 1, and that change may increase the risk or alter the nature or the scope of the risk.

Article 12

Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Commentary

(1) Under article 12, a State, before granting authorization to operators to undertake activities referred to in article 1, should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take. The Commission feels that as these articles are designed to have global application, they cannot be too detailed. They should contain only what is necessary for clarity.

(2) Consideration of the interests of others through assessment of the consequences of an activity, as provided for in this article, has been explicitly recognized as an obligation and referred to by the Trail Smelter Tribunal and by some States in their international relations. In its award in the Trail Smelter case, the Tribunal briefly described and highly commended the comprehensive and long-term experiments and collections of data analysed in order to develop a permanent regime fulfilling the duty of care required of the Canadian smelter. The tests had been carried out over a period of three years under the supervision of what the Tribunal called "well-established and known scientists" in chemistry, plant physiology, meteorology and the like, for the purpose of collecting data on the pollution caused by the smelter and on the damage to United States interests. In the opinion of the Tribunal, the study was "probably the most thorough [one]

ever made of any area subject to atmospheric pollution by industrial smoke". 40/ Some of the factors considered had been used for the first time in evaluating smoke control. The methods successfully used in testing eventually became embodied in the regime adopted by the Tribunal. 41/

(3) The requirement of article 12 is compatible with Principle 17 of the Rio Declaration on Environment and Development provides also for impact assessment of activities that are likely to have a significant adverse impact on the environment:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. 42/

Requirement of assessment of adverse effects of activities have been incorporated in various forms in many international conventions. 43/ The most notable is the

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40/ UNRIAA, vol. III, p. 1973.

41/ Ibid., pp. 1973-1974.

42/ A/CONF.151/Rev.1 (vol.I), p. 3.

43/ See, for example, Arts. 205 and 206 of the United Nations Convention on the Law of the Sea, A/CONF.62/122; Art. 4 of the Convention on the Regulation of Antarctic Mineral Resources Activities of 2 June 1988, International Legal Materials, vol. 28, p. 868; Art. 8 of the Protocol on Environmental Protection to the Antarctic Treaty, of 4 October, 1991, ibid, vol. 30, p. 1461; Art. 14 (1) (a) and (b) of the Convention on Biological Diversity of 1992, doc. DPI/1307; Art. 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources, of 9 July 1985 in Selected Multilateral Treaties in the Field of Environment, vol. 2, p. 343; Noumea Convention for the Protection of the Natural Resources and Environment of the South-Pacific Region, of 24 November 1986, International Legal Materials, vol. 26, p. 38; Art. XI of Kuwait Regional Convention for the Cooperation on the Protection of the Marine Environment from Pollution, of 24 April 1978, ibid., vol. 17, p. 511; and Jeddeh Regional Convention for the Conservation of the Regional Environment of the Red Sea and Gulf of Aden, of 14 February 1982, Selected Multilateral Treaties in the Field of Environment, vol. 2, p. 144. In some treaties, the requirement of impact assessment is implied. For example, the two multilateral treaties regarding communication systems require their signatories to use their communications installations in ways that will not interfere with the facilities of other States parties. Art. 10,

Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 which is devoted entirely to the procedure to conduct and the substance of impact assessment. 44/

(4) The question of who should conduct the assessment is left to the States. Such assessment is normally conducted by operators observing certain guidelines set by the States. The evaluation of such assessments is normally done by government departments or agencies. These matters would have to be resolved by the States themselves through their domestic laws. However, it is presumed that a State will designate an authority whether or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(5) The article does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment. 45/ General Assembly resolution 37/217

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para. 2, of the 1927 International Radiotelegraph Convention requires the parties to the Convention to operate stations in such a manner as not to interfere with the radioelectric communications of other contracting States or of persons authorized by those Governments. League of Nations, Treaty Series, vol. LXXXIV, p.97. Again, the 1936 International Convention concerning the Use of Broadcasting in the Cause of Peace prohibits the broadcasting to another State of material designed to incite the population to act in a manner incompatible with the internal order of security of that State. Ibid., vol. CLXXXVI, p. 301.

44/ For the text of the Convention see, Internationales Umweltrecht - Multilaterale Vertrage, BzUB7/I./92, reprinted in International Legal Materials, vol. 30, p. 800.

45/ A prime example, is article 4 of the Convention on Environmental Impact Assessment in a Transboundary Context of 1991. That article provides that the environmental impact assessment of a State party should contain as a minimum, the information described in Appendix II to the Convention. Appendix II lists nine items as follows:

Content of the Environmental Impact Assessment Documentation

of 24 March 1983 on International Cooperation in the Field of the Environment also provides, in conclusion No. 8, in detail for the content of assessment for offshore mining and drilling. 46/

(6) The prevailing view in the Commission is to leave the specifics of what ought to be the content of assessment to the domestic laws of the State conducting such assessment. However, the Commission feels that such an assessment shall contain, at least, an evaluation of the possible harmful impact of the activity concerned on persons or property as well as on the environment of other States. This requirement, which is contained in the second sentence of article 12, is intended

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Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with Article 4:

(a) A description of the proposed activity and its purpose;

(b) A description, where appropriate, of reasonable alternatives (for example, location or technological) to the proposed activity and also the no-action alternative;

(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

(e) A description of mitigation measures to keep adverse environmental impact to a minimum;

(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

For the Convention, see International Legal Materials, vol. 30, p. 800, 1991.

46/ General Assembly Official Records: Thirty-seventh Session, Supp. No. 51 (A/37/51).

to clarify further the reference, in the first sentence, to the assessment of "the risk of the activity causing significant transboundary harm". The Commission believes that the additional clarification is necessary for the simple reason that the State of origin will have to transmit the risk assessment to the States which might be suffering harm by that activity. In order for those States to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them as well as the probabilities of the harm occurring. That information is crucial, as the article makes clear.

(7) The assessment shall include the effects of the activity not only on persons and property, but also on the environment of other States. The Commission is convinced of the necessity and the importance of the protection of the environment, independently of any harm to individual human beings or property.

(8) It is the view of the Commission that the requirement of authorization obliges a State to be aware that an activity with a possible risk of significant transboundary harm is taking place in its territory or otherwise under its jurisdiction or control and that the State should take the measures indicated in these articles. This article requires the State to take a more responsible and active role in regulating activities taking place in their territory or under their jurisdiction or control with possible significant transboundary harm. The Commission takes note, in this respect, of the decision by the Trail Smelter Tribunal holding that Canada was responsible in international law for the conduct of the Trail Smelter, and that its Government had "the duty ... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined". 47/ The Tribunal held that in particular, "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington". 48/ In the view of the Commission, article 11 is compatible with this requirement.

47/ United Nations, Reports of International Arbitral Awards, vol. 3, pp. 1965-66.

48/ Ibid, p. 1966.

(9) This article does not oblige the States to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. Activities involving a risk of causing significant transboundary harm have some general characteristics which are identifiable and could provide some indication to States as to which activities might fall within the terms of these articles. For example, the type of the source of energy used in manufacturing an activity, the substances manipulated in production, the location of the activity and its proximity to the border area, etc. could all give an indication of whether the activity might fall within the scope of these articles. There are certain substances that are listed in some conventions as dangerous or hazardous and their manipulation in any activity in itself may be an indication that those activities might have significant transboundary harm. 49/ There are also certain conventions that list the activities that are presumed to be harmful and that might signal that those activities might fall within the scope of these activities. 50/ The Commission is aware that additional criteria

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49/ For example, the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources provides in Art. 4 an obligation for parties to eliminate or restrict the pollution of the environment by certain substances and the list of those substances are annexed to the Convention, UNEP, Selected Multilateral Treaties in the Field of the Environment, Ref. Series 3, 1983, p. 430. Similarly, the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area provides a list of hazardous substances in annex I and of noxious substances and materials in annex II, deposits of which are either prohibited or strictly limited, in ibid, p. 405. See also the Protocol to the 1976 Convention for the Protection of the Mediterranean Sea against Pollution, in ibid., p. 448; and the 1976 Convention for the Protection of the Rhine against Chemical Pollution, in United Nations, Treaty Series, vol. 1124, p. 375.

50/ See for example annex I to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, where a number of activities such as the crude oil refineries, thermal power stations, installations to produce enriched nuclear fuels, etc. are identified as possibly dangerous to the environment and requiring environmental impact assessment under the Convention, International Legal Materials, vol. 30, p. 800; and annex II of the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, where activities such as the installations of sites for the partial or complete disposal of solid, liquid wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc. have been identified as dangerous activities. This Convention also has a list of dangerous substances in annex I. The Convention

are necessary to determine with more precision the type of activities within the scope of these articles. It, therefore, intends to consider the issue at a later stage and recommend either a provision defining the activities falling within the scope of these articles or a provision listing such activities or certain quality of such activities.

Article 13

Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

Commentary

(1) Article 13 is intended to apply in respect of activities within the scope of article 1, which were being conducted by a State before that State assumed the obligations contained in these articles. The words "having assumed the obligations contained in these articles" are without prejudice to the final form of these articles.

(2) In accordance with this article, when the State "ascertains" that such an activity has been conducted in its territory or otherwise under its jurisdiction or control, before these articles come into force for it, it should "direct" those responsible for carrying out the activity to obtain the necessary authorization. The expression "necessary authorization" here means permits required under the domestic law of the State, in order to implement its obligations under these articles.

(3) The Commission is aware that it might be unreasonable to require States party to these articles to apply immediately these articles in respect of existing activities. An immediate requirement of compliance could put a State in breach of the article, the moment it becomes party to them. In addition, a State

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party, at the moment of entry into force of these articles, might not know of the existence of all such activities within its territory or under its jurisdiction or control. For that reason, the article provides that when a State "ascertains" the existence of such an activity, it should comply with the obligations. The word "ascertain" in this article should not, however, be interpreted so as to justify States, when becoming parties to these articles, to take no action to identify such activities or merely to wait until such information is brought to their knowledge by other States or private entities. The word "ascertain" should be understood in the context of the obligation of due diligence, requiring reasonable and good faith efforts by the States to identify such activities. Therefore, the word "ascertain" should be understood in the context of the explanations given in this paragraph.

(4) A certain period of time might be needed for the operator of the activity to comply with the authorization requirements. The Commission is of the view that the choice between whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization should be left to the State of origin. If the State chooses to allow the activity to continue, it does so at its own risk. It is the view of the Commission that absent any language in the article indicating possible repercussions, the State of origin will have no incentive to comply and to do so expeditiously with the requirements of these articles. At the same time, in view of the fact that the Commission has not yet decided on the form and the substance of a liability regime for this topic, the issue cannot be prejudged at this time. Therefore, the expression "at its own risk" is intended (a) to leave the possibility open for any consequences as the future draft articles on this topic might impose on the State of origin in such circumstances; and (b) to leave the possibility open for the application of any other rule of international law on responsibility in such circumstances.

(5) Some members of the Commission favoured the deletion of the words "at its own risk". In their view, those words implied that the State of origin may be liable for any damage caused by such activities before authorization was granted. That implication, they believed, prejudged the issue of liability which the Commission had not even discussed. The reservation of these members extended

also to the use of these words in article 18, paragraph 3. Other members of the Commission, however, favoured the retention of those words. In their view, those words did not imply that the State of origin was liable for any harm caused; it only kept the option of such a possible liability open. They also felt that the deletion of those words would change the fair balance the article maintains between the interests of the State of origin and the States likely to be affected.

(6) In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity. If the State of origin fails to do so, it will be assumed that the activity is being conducted with the knowledge and the consent of the State of origin and therefore the second sentence of article 13 becomes applicable.

Article 14*

Measures to prevent or minimize the risk

States shall take legislative, administrative or other actions to ensure that all appropriate measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

Commentary

(1) The standard of the obligation of States to take preventive measures is due diligence. Article 14 is the core of the due diligence obligation requiring States to take certain unilateral measures to prevent or minimize a risk of significant transboundary harm. The obligation imposed by this article is not an obligation of result within the meaning of article 21 of Part One of State responsibility. It is the conduct of a State that will determine whether the State has complied with its obligation under this article.

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* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused.

(2) Due diligence has been widely used in international conventions 51/ as well as in the resolutions and reports of international conferences and organizations as the standard basis for the protection of the environment from harm. 52/ The obligation of due diligence was recently discussed in a dispute between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries. 53/

(3) In the Alabama case, the Tribunal examined two different definitions submitted by the parties, the United States and the United Kingdom, of due diligence. The United States defined due diligence as:

> "[A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter

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51/ See for example, Art. 194, para. 1 of the United Nations Convention on the Law of the Sea, A/CONF.62/122; Arts. I, II and VII(2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter in International Legal Materials vol. 11, p. 1294; Art. 2 of the Vienna Convention for the Protection of the Ozone Layer; Ibid; vol. 26, p. 1529. Art. 7, para. 5 of the Convention on the Regulation of Antarctic Mineral Resources Activities International Legal Materials, vol. 28, p. 868; Art. 2 para. 1 of the Convention on Environmental Impact Assessment in a Transboundary Context, doc. E/ECE/1250; and Art. 2, para. 1 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes International Legal Materials vol. 31, p. 1313.

52/ See Principle 21 of the World Charter for Nature, General Assembly resolution 37/7 adopted on 28 October 1982; Principles VI and VIII of Draft Principles relating to weather modification prepared by the WHO and by UNEP, in Digest of United States Practice in International Law, 1978, p. 1205.

53/ See New York Times, 11 November 1986, p. A 1; 12 November 1986, p. A 8; 13 November 1986, p. A 3. See also Alexander Kiss, "Tchernobale" ou la pollution accidentelle due Rhin par les produits chimiques, in Annuaire Français de Droit International, vol. 33, 1987, pp. 719-727.

> designing men from committing acts of war upon the soil of the neutral against its will, ..." 54/

The other party to the dispute, United Kingdom, defined due diligence as "such care as governments ordinarily employ in their domestic concerns." 55/ The Tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The Tribunal stated that "The British Case seemed also to narrow the international duties of a government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient." 56/

(4) The extent and the standard of the obligation of due diligence was also elaborated on by Lord Atkin in the case of Donoghue v. Stevenson as follows:

> The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, "who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question. 57/

(5) In the context of article 14, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus, in accordance with article 14, States are

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54/ The Geneva Arbitration (The Alabama case) in J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol. I, 1898, pp. 572-73.

55/ Ibid., p. 612.

56/ Ibid.

57/ [1932] A.C., p. 580 (H.L.(Sc)).

under an obligation to take unilateral measures to prevent or minimize the risk of transboundary harm of the activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or minimize transboundary harm and, second, implementing those policies. Such policies are expressed in legislation and administrative instructions and implemented through various enforcement mechanisms. The word "ensure" in the phrase "to ensure that all necessary measures are adopted" is intended to require a particularly high standard in State behaviour viz., to be rigorous in designing and implementing policies directed at minimizing transboundary harm.

(6) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special climate conditions; materials used in the activity; and whether the conclusions drawn from the application of these factors in a specific case are reasonable are among the factors to be considered in determining the due diligence requirement in each instance. The Commission also believes that what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time, might not be considered as such at some point in the future. Therefore, due diligence requires a State to keep abreast of technological changes and scientific developments and to determine not only that equipment for a particular activity is working properly, but also that it meets the most current specifications and standards.

(7) The Commission takes note of Principle 11 of the Rio Declaration on Environment and Development which states:

> States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards

applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries. 58/

Similar language is found in Principle 23 of the Stockholm Declaration. That Principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community". 59/ It is the view of the Commission, that the economic level of States is one of the factors which is taken into account in determining whether an appropriate standard of due diligence has been exercised by a State. But a State's economic level cannot be used to discharge a State from its obligation under this article.

(8) The words "administrative and other actions" cover various forms of enforcement actions. Such actions may be taken by regulatory agencies monitoring the activities and courts and by administrative tribunals imposing sanctions on operators not complying with the rules and the standards or any other pertinent enforcement procedure a State has established.

(9) The obligation of the State is first to attempt to design policies and to take legislative or other actions with the aim of preventing significant transboundary harm. If that is not possible, then the obligation is to attempt to minimize such harm. In the view of the Commission, the word "minimize" should be understood in this context to mean reducing the possibility of harm to the lowest point possible.

(10) The expression "prevention" in this article, pending a further decision by the Commission, is intended to cover only those measures taken before the occurrence of an accident in order to prevent or minimize the risk of the occurrence of the accident.

Article 14 bis [20 bis]

Non-transference of risk

58/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

59/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Doc. A/CONF.48/Rev.1.

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Commentary

(1) This article states a general principle of non-transference of risk. It calls on States when taking measures to prevent or minimize a risk of causing significant transboundary harm, to ensure that the risk is not "simply" transferred, directly or indirectly, from one area to another or transformed from one type of risk to another. This article is inspired by the new trend in environmental law, beginning with its endorsement by the Stockholm Conference on the Human Environment, to design comprehensive policy for protecting the environment. Principle 13 of the General Principles for Assessment and Control of Marine Pollution suggested by the Intergovernmental Working Group on Marine Pollution and endorsed by the United Nations Conference on the Human Environment provides:

> Action to prevent and control marine pollution (particularly direct prohibitions and specific release limits) must guard against the effect of simply transferring damage or hazard from one part of the environment to another. 60/

(2) This Principle was incorporated in article 195 of the United Nations Convention on the Law of the Sea which states:

> In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another. 61/

Article II, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters also provides for a similar principle:

> In taking measures to control and regulate hazardous activities and substances, to prevent and control accidental pollution, to mitigate damage arising from accidental pollution, countries should do everything so as not

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60/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Annex III, doc. A/CONF.48/Rev.1, p. 73.

61/ A/Doc.A/CONF.62/122.

> to transfer, directly or indirectly, damage or risks between different environmental media or transform one type of pollution into another. 62/

(3) The Rio Declaration on Environment and Development discourages States, in Principle 14, from relocating and transferring to other States activities and substances harmful to the environment and human health. This Principle even though primarily aimed at a different problem, is rather more limited than Principle 13 of the Principles for Assessment and Control of Marine Pollution, the Law of the Sea and the Code of Conduct mentioned earlier. Principle 14 reads:

> States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health. 63/

(4) The expression "simply transferred" is taken from Principle 13 of the Principles for Assessment and Control of Marine Pollution endorsed by the Stockholm Conference in 1972. That expression is concerned with precluding actions that purport to prevent or minimize but, in fact, merely externalize the risk by shifting it to a different sequence or activity without any meaningful reduction of said risk. The Commission is aware that, in the context of this topic, the choice of an activity, the place in which it should be conducted and the use of measures to prevent or reduce risk of its transboundary harm are, in general, matters that have to be determined through the process of finding an equitable balance of interests of the parties concerned; obviously the requirement of this article should be understood in that context. It is, however, the view of the Commission that in the process of finding an equitable balance of interests, the parties should take into account the general principle provided for in the article.

62/ E/ECE/1225; ECE/ENVWA/16.

63/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

(5) The word "transfer" means physical movement from one place to another. The word "transformed" is taken from article 195 of the Law of Sea Convention and refers to the quality or the nature of risk. The words "directly or indirectly" are also taken from article 195 of the Law of the Sea Convention and are intended to set a much higher degree of care for the States in complying with their obligations under this article.

Article 15

Notification and information

1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Commentary

(1) Article 15 deals with a situation in which the assessment undertaken by a State, in accordance with article 12, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 16, 16 bis, 18 and 19 provides for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity with satisfactory and reasonable measures designed to prevent or minimize transboundary harm.

(2) Article 15 calls on a State to notify other States that are likely to be affected by the activity that is planned. The activities here include both those that are planned by the State itself and by private entities. The requirement of notification is an indispensable part of any system designed to prevent or minimize transboundary harm.

(3) The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the Corfu Channel case, where the

International Court of Justice characterized the duty to warn as based on "elementary considerations of humanity". 64/ This principle is well developed in the context of the use of international watercourses and in that context is embodied in a number of international agreements, decisions of international courts, and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations. 65/

(4) In addition to the utilization of international watercourses, the principle of notification has also been developed in respect of other activities with transboundary effects. For example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context 66/ and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents. 67/ Principle 19 of the Rio Declaration on Environment and Development speaks of timely notification:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith. 68/

(5) The procedure for notification has been established by a number of OECD resolutions. For example, in respect of certain chemical substances, OECD resolution C(71)73 of 18 May 1971 stipulates that each member State is to receive

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64/ Corfu Channel Case, I.C.J. Reports, p. 22, 1949.

65/ For treaties dealing with prior notification and exchange of information in respect of watercourses, see commentary to article 12 "Notification concerning planned measures with possible adverse effects" of the draft articles on The Law of the Non-Navigational Uses of International Watercourses, Chapter ... , page ... above.

66/ Article 3 of the Convention provides for an elaborate system of notification. For the Convention see, E/ECE/1250, reproduction International Legal Materials, vol. 30, p. 800. ...

67/ Ibid., vol. 31, p. 1333.

68/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

notification prior to the proposed measures in each other member State regarding substances which have adverse impact on man or the environment where such measures could have significant effects on the economics and trade of the other States. 69/ OECD resolution C(74)224 on 14 November 1974 on the "Principles concerning transfrontier pollution" in its Principle on "Principle of information and consultation" requires notification and consultation prior to undertaking an activity which may create a risk of significant transboundary pollution. 70/

(6) The principle of notification is well established in case of environmental emergencies. Principle 18 of the Rio Declaration on Environment and Development, 71/ article 198 of the United Nations Convention on the Law of Sea; 72/ article .. of the Convention on Early Notification of a Nuclear Accident; 73/ article 14 (1) (d) and (3) of the Convention on Biological Diversity; 74/ and article 5 (1) (c) of the International Convention on Oil Pollution Preparedness, Response and Cooperation 75/ all require notification.

(7) Where assessment reveals the risk of causing significant transboundary harm, in accordance with paragraph 1, the State which plans to undertake such activity has the obligation to notify the States which may be affected. The notification shall be accompanied by available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity. This information is generally revealed during the assessment of

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69/ OECD, OECD and the Environment, 1986, p. 89, para. 4 of the Annex.

70/ Ibid., p. 142.

71/ Ibid.

72/ Doc. A/CONF.62/122.

73/ International Legal Materials, vol. 25, p. 1369.

74/ Doc. DPI/1307.

75/ International Legal Materials, vol. 30, p. 735.

the activity in accordance with article 12. Paragraph 1 assumes that technical information resulting from the assessment includes not only what might be called raw data, namely fact sheets, statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm.

(8) States are free to decide how they wish to inform the States that are likely to be affected. As a general rule, it is assumed that States will directly contact the other States through diplomatic channels. In the absence of diplomatic relations, States may give notification to the other States through a third State.

(9) Paragraph 2 addresses the situation where the State of origin, despite all its efforts and diligence, is unable to identify all the States that may be affected prior to authorizing the activity, but during the process of authorization or after the activity is undertaken gains that knowledge. In accordance with this paragraph, the State of origin, in such cases, is under the obligation to make such notification without delay. The reference without delay is intended to require that the State of origin should make notification as soon as the information comes to its knowledge and it has had an opportunity, within a reasonable time, to determine that certain other States are likely to be affected by the activity.

Article 16

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

Commentary

(1) Article 16 deals with steps to be taken after an activity has been undertaken. The purpose of all these steps is the same as previous articles viz., to prevent or minimize the risk of causing significant transboundary harm.

(2) Article 16 requires the State of origin and the likely affected States to exchange information regarding the activity, after it has been undertaken. In the view of the Commission, preventing and minimizing the risk of transboundary harm based on the concept of due diligence are not a once-and-for-all effort;

they require continuing efforts. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues in respect of monitoring the implementation of the activity as long as the activity continues.

(3) The information that is required to be exchanged, under article 16, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally such information comes to the knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for prevention purposes, it should make it available to the State of origin.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States. 76/ In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as for example, competent international organizations.

76/ For example, article 10 of the Convention on the Protection of Marine Pollution from Land-based Sources; International Legal Materials, vol. 13, p. 352; article 4 of the Vienna Convention for the Protection of the Ozone Layer, ibid., vol. 26, p. 1529 and article 200 of the United Nations Convention on the Law of Sea, A/CONF.62/122 speak of individual or joint research by the States Parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-range Transboundary Air Pollution provides for research and exchange of information regarding the impact of activities undertaken by the State parties to the Convention, in International Legal Materials, vol. 18, p. 1442. Examples are found in other conventions such as article VI, para. 1 (iii) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, Doc. E/ECE/1225-ECE/ENVWA/16; article 17 of the Convention on Biological Diversity, Doc. DPI/1307; and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Legal Materials, vol. 31, p. 1313.

(5) Article 16 requires that such information should be exchanged in a timely manner. This means that when the State becomes aware of such information, it should inform the other States quickly so that there will be enough time for the States concerned to consult on appropriate preventive measures or the States likely to be affected will have sufficient time to take proper actions. (6)There is no requirement in the article as to the frequency of exchange of information. The requirement of article 16 comes into operation only when States have any information which is relevant to preventing or minimizing transboundary harm.